NO. 82-139

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In the

Supreme Court of the United States

October Term, 1982

JACOBY & MEYERS, a partnership,

Appellant,

vs.

SUPREME COURT OF NEW JERSEY; ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY; and NEW JERSEY STATE BAR ASSOCIATION,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE SUPREME COURT OF NEW JERSEY TO DISMISS OR AFFIRM

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Question Presented

Does DR 2-102(C), a Rule of Discipline of the Supreme Court of New Jersey, which prohibits the practice of law under a firm name unless each named partner was or is a member of the New Jersey bar, violate the First and Fourteenth Amendments, the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the Constitution of the United States as applied by the Supreme Court of New Jersey to permit affiliation by out-of-state law firms with New Jersey firms and, further, to permit advertisement of such affiliation consistent with New Jersey disciplinary rules regulating attorney advertising?

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MOTION OF APPELLEE SUPREME COURT OF NEW JERSEY TO DISMISS OR AFFIRM

The appellee Supreme Court of New Jersey respectfully moves pursuant to Rule 16(1)(b) and (d) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey on the ground that the constitutional questions presented are so insubstantial as to obviate the need for further review, and also because the case does not raise any issues of special importance, does not conflict with federal precedent, was correctly decided below, and may be rendered moot upon the completion of pending State proceedings.

Counter-Statement of the Case

With the adoption of the 1947 State Constitution, the existing decentralized regulation of the legal profession in New Jersey was revamped to establish the Supreme Court of New Jersey, the State's highest appellate court, as the exclusive regulator of the practice of law in the State.* Thus, Article VI, §II, par. 3 of the New Jersey Constitution provides that the Supreme Court of New Jersey,

> "shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts . . . [and] shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

As consistently interpreted by the Supreme Court of New Jersey, this constitutional provision empowers the court to establish and supervise the obligations and conditions as to the practice of law from admission to disbarment and in "every area in which unjust or unethical conduct might afflict the public at the hands of those admitted by the court to the practice of law." *American Trial Lawyers* v. *New Jersey Supreme Court*, 66 N.J. 258, 264, 330 A.2d 350, 353 (1974). See also *In re LiVolsi*, 85 N.J. 576, 428 A.2d 1268 (1981); *State* v. *Rush*, *supra*, 46 N.J. at 410, 217 A.2d at 447. Moreover, in supervising the practice of law in the State, the Supreme Court of New Jersey has "scrupulously endeavored to protect against even the slightest propensity that the public will be deceived or

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* Prior to 1947, control over the admission of attorneys to the practice of law was fragmented with the former Supreme Court recommending, and the Governor approving, the licensing and admission of attorneys to practice in the State. *State* v. *Rush*, 46 N.J. 399, 411-412, 217 A.2d 441, 447 (1966).

misled." *In re Professional Ethics Opinion 447*, 86 N.J. 473, 478, 432 A.2d 59, 61 (1981) (upholding disciplinary rule which prevents attorneys from including non-legal qualifications on law firm letterheads).

In the exercise of its constitutionally delegated powers, the Supreme Court of New Jersey has adopted the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association, as amended and supplemented by the court, to govern the conduct of the members of the bar of this State. See N.J. Ct. R. 1:14 (Ra1).* To assist it in enforcing the New Jersey Disciplinary Rules, the court established the Advisory Committee on Professional Ethics, which Committee is authorized to accept inquiries and issue opinions concerning proper conduct for members of the legal profession under the disciplinary rules. N.J. Ct. R. 1.19-1 *et seq.* (Ra2 to Ra6). A right of direct review by the Supreme Court of New Jersey of an opinion of the Advisory Committee is available to any aggrieved member of the bar under N.J. Ct. R. 1:19-8 (Ra4 to Ra5).

Disciplinary Rule (DR) 2-102(C), as promulgated by the Supreme Court of New Jersey, prohibits the use of a law firm name in the State "unless all those named are or were members of the bar in New Jersey." In September 1980, the law firm of Jacoby & Meyers requested an opinion from the Advisory Committee on Professional Ethics as to whether DR 2-102(C) would permit the use of the Jacoby & Meyers name in connection with a law practice that the firm proposed to establish in New Jersey. Both of the named partners of the firm, Leonard Jacoby and Stephen Meyers, are members of the California bar; they are not,

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* As used throughout, "Ra" refers to the appendix to this motion to dismiss or affirm; "Aa" refers to the appendix to appellant's Jurisdictional Statement.

however, licensed to practice in New Jersey. In 1972, they had formed the law firm of Jacoby & Meyers to serve a large middle-class clientele with basic, standardized legal services. From the time of its origin in California ten years ago, the firm has expanded considerably through the use of media advertising and by opening numerous neighborhood law offices staffed by local attorneys. In 1979 the firm opened several offices in New York under its California name, Jacoby & Meyers. These offices are staffed by New York attorneys under the supervision of a partner licensed to practice in New York. At present, the firm has 75 offices, interviews approximately 500 clients per day, and estimates that it accepts about 600 new matters each week.

In response to the inquiry made by Jacoby and Meyers, the Advisory Committee ruled that the use of Jacoby & Meyers as a New Jersey law firm name was prohibited by the plain language of DR 2-102(C) because neither Leonard Jacoby nor Stephen Meyers had ever been licensed to practice in New Jersey. N.J. Advisory Comm. on Professional Ethics, Op. 475, 107 N.J.L.J. 283 (April 2, 1981) (Aa-A1 to Aa-A3). Thereafter, on April 3, 1981, Jacoby & Meyers petitioned the Supreme Court of New Jersey for review of the Advisory Committee opinion under N.J. Ct. R. 1:19-8, claiming that insofar as DR 2-102(C) bars the use of the Jacoby & Meyers firm name in New Jersey, the rule unconstitutionally infringes upon the firm's First Amendment rights and violates the Commerce, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. The Jacoby & Meyers petition was granted and subsequently, the New Jersey State Bar Association was permitted to intervene in support of the disciplinary rule.

In a decision issued on April 29, 1982, the Supreme Court of New Jersey upheld the constitutionality of DR 2-102(C). *In re Professional Ethics Advisory Comm. Op.*

475, 89 N.J. 74, 444 A.2d 1092 (1982) (Aa-B1 to Aa-B98). As interpreted by the court, this rule reflects the long standing New Jersey custom of limiting law firm names in the State to the names of lawyers admitted to practice in New Jersey, but permits out-of-state and New Jersey law firms to affiliate and to advertise such affiliation (Aa-B36). Although the court considered DR 2-102(C) as limited by its decision to be clearly constitutional, it ordered a reexamination of the rule so as to scrutinize further and in depth "the effects of the rule and its benefits" (Aa-B5; see generally Aa-B5 to Aa-B7). It consequently created a special Supreme Court Committee to evaluate DR 2-102(C),* conduct hearings, and prepare a report and recommendations for submission to the court for final action, including a possible rule change. In light of the importance of the matter, the court asked the committee to provide its report by January 1, 1983 (*Id.*). The committee is currently studying the rule and has scheduled hearings for November 1982. The future retention of the rule is thus uncertain.

As to the constitutionality of DR 2-102(C), however, the Supreme Court of New Jersey carefully analyzed and correctly rejected the contentions of Jacoby & Meyers under the applicable precedents of this Court. In regard to the First Amendment challenge, the court held that the use of an official designation such as a law firm name could be regulated without offending the First Amendment in order to prevent practices inherently misleading to the public, citing *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (upholding a Texas regulation prohibiting the practice of

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* At the same time the court referred DR 2-101(D), the ban on television advertising by New Jersey attorneys, for similar re-evaluation and study in light of certain facts which came to light during the course of this case.

optometry under a trade name because of the potential for deception inherent in the use of trade names). The court specifically found that New Jersey law firm names containing the names of out-of-state attorneys were inherently misleading since the universal practice throughout the history of the legal profession in this State has been to include only New Jersey attorneys in firm names, and since the public expectation that those named in New Jersey firms are licensed to practice in New Jersey has been reinforced by the long existence of the rule (Aa-B30 to Aa-B36). Given the potential for deception inherent in out-of-state firm names in New Jersey, the court upheld the prohibition only against their use as firm names under the rationale of *Friedman* v. *Rogers, supra* (Aa-B20 to Aa-B32).

By providing that New Jersey firms may affiliate with out-of-state firms and advertise that affiliation (Aa-B34 to Aa-B41, citing *In re R.M.J.*, 102 S.Ct. 929 (1982)), the court below narrowed the impact of its ruling and thereby adhered to the directive of this Court to make restrictions upon commercial speech no broader than reasonably necessary to prevent deception. By expressly authorizing this alternative, the Supreme Court of New Jersey sought to promote the legitimate state concern of ensuring that the official status of an attorney as one licensed to practice in New Jersey be conveyed with accuracy and clarity, while nevertheless accommodating the trend toward the multistate practice of law (Aa-B37 to Aa-B41). The court concluded that such an accommodation of interests, with only the narrowest limitation on the use of firm names to prevent deception, is consistent with the First Amendment guarantee of freedom of speech as that guarantee has been applied to commercial speech (Aa-B20 to Aa-B46; citing *Virginia Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748

(1976), and *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

The court next rejected appellant's Commerce Clause claim, finding that the challenged rule addresses legitimate local concerns and is not a protectionist measure. Since DR 2-102(C) applies to all nonlicensed attorneys equally whether they are residents of New Jersey or not, the court found no discrimination and consequently no violation of the Commerce Clause (Aa-B47 to Aa-B49; citing *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960)). It went on to observe, however, that the rule is valid even under the two-part balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), since it is rationally related to the legitimate state concern of preventing deception and creates only a minimal burden on interstate commerce, if any (Aa-B49 to Aa-B51). The court also viewed the Commerce Clause question in light of the strong state interest in regulating the bar recognized in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Leis* v. *Flynt*, 439 U.S. 438 (1979). Quoting from *Leis* v. *Flynt*, *supra*, 439 U.S. at 701, the court emphasized that "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another" (Aa-B53). Given this well established limitation in the practice of law, which clearly burdens interstate legal practice substantially more than the disciplinary rule in question, the court determined that the firm name restriction in New Jersey similarly constituted a valid regulation of the bar and had but a wholly incidental impact on interstate commerce. Consequently, the court concluded that the Commerce Clause challenge raised by Jacoby & Meyers was groundless (Aa-B50 to Aa-B56).

It extended this reasoning to reject as well the claims raised by the appellant under the Privileges and Immunities Clause. Thus, the court held that the right asserted—the right to use the name of Jacoby & Meyers for a New Jersey law firm even though neither named partner is licensed to practice in the State—simply was not a fundamental right insulated from valid state regulation by the Privileges and Immunities Clause (Aa-B57 to Aa-B59; citing *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371 (1978), and *Leis* v. *Flynt*, *supra*). Moreover, since DR 2-102(C) does not discriminate against nonresidents *per se*, but rather permissibly differentiates between members of the New Jersey bar and nonmembers without regard to their place of residence, the court found that there had not been discrimination based on residency, a finding fatal to appellant's privileges and immunities claim (Aa-B59 to Aa-B61).

Finally, the court below considered and rejected appellant's contention that DR 2-102(C) offends the Equal Protection Clause "by unreasonably discriminating between classes of partnership names" since the rule permits the names of deceased partners to be used by New Jersey firms while barring firm names containing lawyers unlicensed in the State (Aa-B61 to Aa-B62). In reviewing this allegation, the court applied the rational relationship test since the rule neither infringed upon a fundamental right (for the right to the use of a particular law firm name cannot be deemed of fundamental importance), nor burdened a suspect class (for lawyers not licensed in New Jersey are not thereby members of a class, such as race or religion, deserving of special protection under the Constitution) (Aa-B62 to Aa-B64; citing *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959), and *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)). Furthermore, the court pointed

to the important distinctions between prohibiting the use of the Jacoby & Meyers name and requiring a change of name by New Jersey firms upon the death of a named partner (Aa-B65 to Aa-B66). Certainly, in the latter case the inevitable change of name would be a source of confusion "without preventing deception where the practice of the firm remains essentially unchanged" (Aa-B67). Such distinctions rationally relate to the classifications established which are "therefore constitutionally permissible under the Equal Protection Clause."* *Id.*

Based upon the foregoing analysis, the Supreme Court of New Jersey sustained the validity of DR 2-102(C) as interpreted in its opinion. Thereafter, on July 20, 1982, Jacoby & Meyers filed a Notice of Appeal with this Court pursuant to 28 U.S.C. §1257(a). Subsequently, appellants filed a Jurisdictional Statement, and this motion on behalf of the Supreme Court of New Jersey followed.

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* The court also noted that even if some deception resulted from the challenged rule, it is not obligated to deal with each and every potential evil at once but, rather, may seek solutions to such problems according to the priorities it deems most appropriate (Aa-B56; citing *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955).

ARGUMENT

As interpreted by the Supreme Court of New Jersey, DR 2-102(C) permits affiliation between out-of-state law firms and New Jersey law firms as well as advertisement of such affiliation; thus, although the rule requires that the name of a New Jersey firm contain only the names of the partners who are or were members of the New Jersey Bar, it does not implicate any question of constitutional significance so as to warrant plenary review by the Court.

As the exclusive regulator of the practice of law in the State of New Jersey, the Supreme Court of New Jersey has repeatedly recognized its responsibility for the proper functioning of the judicial system and, particularly, for "maintaining public confidence" in that system. *In re LiVolsi, supra,* 85 N.J. at 585, 428 A.2d at 1272. In carrying out this responsibility, the court has been mindful of the need to act "with just and decent regard for all vital interests concerned, including those of the public, the bench, the bar and the individual respondents." *In re Logan,* 70 N.J. 222, 225, 358 A.2d 787, 789 (1976). Where questions have arisen as to the continued validity of its rules, or as to their necessity or viability, the Supreme Court of New Jersey has unhesitatingly undertaken an examination of the challenged policies. See *In re Sackman,* 90 N.J. 521, —— A.2d —— (1982) (N.J. Ct. R. 1.21-1(a) modified so as to permit the practice of law in New Jersey by licensed New Jersey attorneys, whether resident or non-resident, upon the condition that such attorneys maintain a *bona fide* office in the State; rule referred to committee constituted to examine the question of firm names to consider also the office requirement of the modified rule); *In re LiVolsi, supra* (review of constitutionality

and desirability of Fee Arbitration Committees, N.J. Ct. R. 1:20A-1 *et seq.*, requiring arbitration of attorney fee disputes upon a client's request, whether the lawyer consents or not, or upon a lawyer's request if the client consents; constitutionality of procedures upheld; need for amendment of rules to provide for limited right of appeal acknowledged); *American Trial Lawyers* v. *N.J. Supreme Court, supra* (constitutionality of rule establishing graduated schedule of maximum contingent fees for tort litigation upheld); *In re NBC*, 64 N.J. 476, 317 A.2d 695 (1974) (Canon of Judicial Ethics barring courtroom sketching during court seessions or recesses modified). As these New Jersey cases indicate, the rules of the State's highest court

> ". . . are never immutable. Applications for their review are never foreclosed [for] . . . [t]he Court does not adopt its rules to promote or brook injustice, but, as best it can, to secure justice, and justice under Constitution and law." *American Trial Lawyers* v. *N.J. Supreme Court, supra*, 66 N.J. at 267, 330 A.2d at 355.

In conformity with this policy, the Supreme Court of New Jersey has considered and interpreted DR 2-102(C) and, further, has referred this rule, along with DR 2-101 (D), to a special Supreme Court Committee for additional intensive study (Aa-35 to Aa-38). Although the court found no constitutional infirmity in DR 2-102(C) it sought reevaluation of the rule, stating:

> "The Court's responsibility in regulation of the State bar is fundamental. We have plenary and exclusive control over both admission to the bar and the practice of law. We seek to exercise that control in the interests of the public. In a rapidly chang-

> ing world we should be careful to remain responsive to the public's needs. However, it would be wrong to alter existing rules and the legitimate expectations they create, without an understanding of what effects the changes may have. We therefore need a thorough review and a study." (Aa-B8 to Aa-B9).

However, even in its present form DR 2-102(C), as interpreted by the Supreme Court of New Jersey, represents a balanced approach addressing not only the potential for deception inherent in the use of firm names in New Jersey where named partners have not been admitted in this State but, also, the demands of a "rapidly changing world" in which multistate practice is increasingly prevalent* (Aa-B8; see also Aa-B39 to Aa-B40). It is the long standing custom locally that the names of New Jersey law firms include only the names of attorneys licensed to practice in the State. This well established practice raises legitimate expectations on the part of New Jersey citizens that the men and women whose names appear as firm names in this State have obtained admission to the bar in this State. Henry S. Drinker, in his fundamental work, *Legal Ethics* (1953), stated the basis for the firm name limitation in simple, unequivocal terms:

> "The name of a lawyer not admitted locally may not be included in the firm name (even though he may properly be a member of the firm) despite a statement on the letterhead, shingle, and law list that he is admitted only in the foreign state, since the firm name appearing elsewhere without such ex-

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* Nonetheless, the presentation of the Supreme Court Committee's report and recommendations may well dictate a rule change in the near future. The court has explicitly stated ". . . our opinion takes no position about the wisdom of retaining the rule" (Aa-B67).

planation would imply that all the members in the name were authorized to practice locally." At 230.*

Where long established practice and usage buttress the strictures of rule, the public would indeed be misled by a departure from such practice. While a rule change, if deemed appropriate, will *a fortiori* alter local custom, nonetheless common understandings can be expected to diminish only over time (see Aa-B37). Moreover, in considering restrictions on advertising by attorneys, this Court has noted that in this area there are "special risks of deception—'[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found inappropriate in legal advertising.'" *In re R.M.J., supra,* 102 S.Ct. at 936, quoting *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 383 (1977) (footnote omitted). Although custom and the lack of sophistication on the part of the public clearly support the reasonableness of DR 2-102(C), the Supreme Court of New Jersey specifically narrowed its scope. As interpreted, this rule not only furthers the legitimate interests of avoiding practices likely to deceive the public, but also reasonably accommodates the realities of interstate practice. In this appeal, Jacoby & Meyers challenges the constitutionality of the rule as limited by the court below.

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* See *ABA Comm. on Professional Ethics,* Formal Op. 318 (1967), which provides a history of the firm name question to the date of the opinion. It is interesting to note the committee's comment in §I that "[v]irtually all of the [prior] opinions . . . recognize the significance of local custom and usage in determining whether a firm name may be false or misleading . . ." Appellant emphasizes that the *ABA Model Code of Professional Responsibility* DR 2-102(C) permits out-of-state firm names; however, the *ABA Model Code* has never been binding on the states and, by its own terms, frequently defers to local custom. See *e.g., ABA Model Code* DR 2-102(B).

A. The narrow restriction on the use of the Jacoby & Meyers firm name in New Jersey to prevent deception falls so clearly within the parameters of permissible regulation under the Commercial Speech Doctrine as to totally obviate the need for further review.

Under the ruling of the New Jersey Supreme Court, appellant may not open a law firm in New Jersey under the name Jacoby & Meyers since neither named partner is a member of the New Jersey bar. The decision below does not completely foreclose use of the Jacoby & Meyers firm name in the State, however, for appellant may affiliate with a New Jersey law firm and advertise the affiliation using its California name. As the court explicitly held in relation to out-of-state firms:

> "Lawyers in New Jersey affiliated with such a firm will be able to signify in an appropriate manner their affiliation on letterheads, professional cards and office signs, so long as they make clear that the out-of-state firm is not licensed to practice in New Jersey. Similarly, the multijurisdictional firm will be free to advertise its association with a New Jersey affiliate, consistent with this State's rule on lawyer advertising." (Aa-B40 to Aa-B41).

The restriction on the use of the Jacoby & Meyers firm name in New Jersey is consequently extremely narrow. Although appellant argues that this minimal incursion upon the use of its firm name violates the First Amendment, the disciplinary rule in question falls so clearly within the parameters of permissible regulation of commercial speech as to totally obviate the need for further review of this matter.

While this Court has afforded some protection to commercial speech in a doctrine evolving from *Virginia Phar-*

macy v. *Va. Citizens Consumer Council, supra,* it has nevertheless repeatedly stressed that the difference between commercial speech and other varieties of speech entitle the former to a different and lesser degree of protection than the latter. This is so primarily because commercial speech is inextricably linked to commercial activity and is carefully calculated to promote business profits, thus making it less likely to be inhibited by proper regulation than other forms of speech. *Id.* at 771 n. 24; *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 383; *Friedman* v. *Rogers, supra,* 440 U.S. at 10; *Central Hudson Gas* v. *Public Service Com'n of New York,* 447 U.S. 557, 562-564 (1980). Moreover, since the First Amendment's concern for commercial speech is based upon the informational function of advertising, regulations aimed at promoting truthful commercial communications and fair dealing in the marketplace are permitted. *In re R.M.J., supra,* 102 S.Ct. at 937.

The necessary corollary to the foregoing proposition is that commercial speech which is false, deceptive, or misleading is subject to restraint. *Id.; Central Hudson, supra,* 447 U.S. at 562-564; *Virginia Pharmacy, supra,* 425 U.S. at 771. States thus retain the power to regulate commercial activity deemed harmful to the public even when the activity in question involves speech. *Friedman* v. *Rogers, supra,* 440 U.S. at 10; *Ohralik* v. *Ohio State Bar Assn.,* 436 U.S. 447, 456 (1978). In exercising this power, states may place reasonable restrictions on the time, place, and manner of advertising. *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 384; *Virginia Pharmacy, supra,* 425 U.S. at 771-772. Such restrictions may require, for example, that a commercial message appear in such form, or include such additional information or warnings, as to insure that it does not lead to deception. While "[m]isleading advertising may be prohibited entirely," and states may im-

pose appropriate restraints "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse," restrictions upon such advertising "may be no broader than reasonably necessary to prevent the deception." *In re R.M.J., supra,* 102 S.Ct. at 937.

The narrow restriction imposed upon the use of out-of-state law firm names by DR 2-102(C) is clearly authorized by the foregoing principles because, as interpreted by the Supreme Court of New Jersey, the disciplinary rule sweeps no broader than reasonably necessary to prevent the potential for deception which could arise if named partners in a New Jersey firm are not and never have been members of the State bar. In fact, by permitting the advertisement of affiliation with out-of-state law firms, the rule merely restricts the manner in which the Jacoby & Meyers name can be used in New Jersey; it does not prohibit mention of the name altogether. Since the rule constitutes a reasonable manner restriction aimed at preventing deception and permits an alternate means of communicating the connection or affiliation between out-of-state and New Jersey firms, it simply does not give rise to an issue of constitutional significance.

The propriety of upholding DR 2-102(C) against a First Amendment challenge is also particularly clear when this case is analyzed under *Friedman* v. *Rogers, supra.* In *Friedman,* the Court sustained a Texas regulation prohibiting the practice of optometry under a trade name, noting that the restriction in question had only the most incidental effect on the content of commercial speech. 440 U.S. at 16. The decision emphasized that while the use of a trade name could enhance the solicitation of patronage, the name itself had no intrinsic meaning and was consequently

quite different from and less entitled to protection than advertising about the price and availability of products and services. The Court thus distinguished the use of a trade name from the advertising protected in *Virginia Pharmacy* and *Bates*. 440 U.S. at 12, 16. It noted that while a trade name could acquire meaning over time through ill-defined associations, the name had the potential to be manipulated and used to mislead the public. Consequently, reasonable regulation in the form of a ban on the use of trade names in the practice of optometry was found necessary to prevent the very real potential for deception.

While the holding in *Friedman* compels the conclusion reached on First Amendment grounds by the Supreme Court of New Jersey in the Jacoby & Meyers matter, it is important to point out that the restrictions in both cases simply prohibit the practice of closely regulated professions under particular kinds of names found to be inherently misleading to the consumer public. Such limited restraints have a minimal impact on commercial speech, for the factual information associated with the trade or firm name—such as the type of services offered and the prices charged—may be communicated freely to the public.* In fact, it is deserving of note that the rule at issue here is even less restrictive than the one upheld in *Friedman* because DR 2-102(C), as interpreted by the Supreme Court of New Jersey, allows out-of-state and New Jersey law firms to affiliate and publish such affiliations, while the

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*Upon affiliation with a New Jersey firm, Jacoby & Meyers may advertise the connection and the services and prices offered by its New Jersey affiliate consistent with the New Jersey Disciplinary Rules governing legal advertising. Since such activities are consistent with DR 2-102(C), the operation of this rule will not inhibit the provision of low-cost, standardized legal services in New Jersey.

Texas rule prohibited even the mention of a trade name in connection with the practice of optometry. In construing the disciplinary rule to permit more communication than allowed in *Friedman*, the court below properly accommodated the need to regulate commercial activity to protect the public with the directive contained in *In re R.M.J.*, *supra*, 102 S.Ct. at 937, that restrictions on commercial speech be limited to those deemed reasonably necessary to prevent deception. The narrow restraint resulting from this accommodation is obviously well within the parameters established by this Court for permissible regulation of commercial speech.

Despite the clear and persuasive analogy between the trade name at the heart of *Friedman* and the law firm name involved here, Jacoby & Meyers argues in its Jurisdictional Statement that *Friedman* is not controlling in this case since it applies only where actual abuse or deception has been demonstrated. This position is plainly wrong. In *Friedman*, although the Court took notice of a history of abuse in the commercial practice of optometry in Texas, no actual deception was shown on the record involving the particular trade optometrists before the Court. The Court consequently relied upon the potential for deception inherent in the use of trade names and the large-scale commercial practice of optometry in reaching its decision to uphold the law. 440 U.S. at 14-16. And recently, in *In re R.M.J.*, *supra*, 102 S.Ct. at 937, the Court reaffirmed that restrictions on commercial speech are appropriate either when advertising is inherently likely to deceive, or when the record indicates that a particular form or manner of advertising has been deceptive. It is clear, therefore, that states may regulate commercial speech when the nature of the speech is likely to mislead the public.

Appellant has also tried to avoid both the holding of *Friedman* and the basic tenet of commercial speech doc-

trine, which permits the regulation of misleading advertising, by asserting that the real purpose of DR 2-102(C) is not, as the court below held, to prevent deception, but rather to protect New Jersey lawyers from out-of-state competition. Jacoby & Meyers overlooks the fact, however, that this Court cannot disregard the reasons given by the Supreme Court of New Jersey to support the disciplinary rule in question. *Martin* v. *Walton*, 368 U.S. 25, 26 (1961), dismissing *Martin* v. *Davis*, 187 Kan. 473, 357 P. 2d 782 (1960) (upholding a rule which required Kansas attorneys who practiced regularly in other states to retain local counsel before appearing in the Kansas courts). See also *Brown* v. *Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va. 1973), summarily aff'd 414 U.S. 1034 (1974) (Virginia bar rule governing admission by reciprocity upheld as supporting a valid state interest despite claim that one effect of the rule was to protect resident Virginia attorneys from competition). Deference should thus be given to the findings of the Supreme Court of New Jersey since it is the forum best equipped to determine and articulate the purpose of a disciplinary rule it adopted for the regulation of the bar in the State. Moreover, as demonstrated in the opinion below, long standing custom and the universal application of the firm name rule in New Jersey have fostered consumer expectations which may not be prevalent elsewhere, but which realistically could be frustrated by permitting the names of attorneys unlicensed in the State to be used in New Jersey law firm names. The prevention of deception is thus truly at the heart of DR 2-102(C). Finally, in regard to economic protectionism, it is important to note that the Supreme Court of New Jersey recently changed a disciplinary rule to provide for equal treatment between resident and nonresident licensed attorneys. In re *Sackman*, *supra*, 90 N.J. at 522. This opinion makes clear that the court is not swayed by the financial interest of the

local bar, but, rather, wants to ensure that more qualified lawyers are available to New Jersey citizens. 90 N.J. at 530. The protectionist motive ascribed by appellants to the court below consequently is unsupportable.

The Supreme Court of New Jersey properly applied the commercial speech doctrine in sustaining the extremely narrow restriction on the use of out-of-state law firm names in New Jersey against appellant's First Amendment challenge. In fact, in light of the alternate means of communication specifically authorized by the court below, and the wholly incidental impact on commercial speech caused by the valid bar regulation contained within DR 2-102(C), the First Amendment claim raised by Jacoby & Meyers in this appeal is so insubstantial as to warrant either dismissal by the Court, or summary affirmance of the decision of the Supreme Court of New Jersey.

B. Since DR 2-102(C) neither discriminates based upon residency nor affects any fundamental right, it does not violate the Privileges and Immunities Clause.

The disciplinary rule at issue in this case differentiates between members of the New Jersey bar and attorneys licensed elsewhere but not admitted to practice in New Jersey. That this is so is evident from the plain language of DR 2-102(C) which allows the names of attorneys licensed to practice in the State to be used in New Jersey firm names, while prohibiting the names of unlicensed attorneys from being similarly utilized. The rule thus draws a distinction based on bar membership and not upon residency. For example, a New York or Pennsylvania resident admitted to the bar in New Jersey can practice law in the State in a firm bearing his or her name and is treated identically in this regard to New Jersey attorneys who happen to live in the State. Since DR 2-102(C) does

not discriminate on the basis of residency, its operation cannot and does not implicate the Privileges and Immunities Clause of the Constitution which prohibits a state from discriminating against nonresidents in regard to fundamental rights or essential activities. See *Baldwin* v. *Montana Fish & Game Com'n, supra,* 435 U.S. at 380-384; *Hicklin* v. *Orbeck,* 437 U.S. 518, 523-526 (1978). Distinctions based upon bar membership simply do not come within the meaning of the Clause.

The appellant's argument is also unavailing because it has failed to demonstrate that the "right" to open a law practice under its California firm name in a state where neither named partner is admitted to the bar is a fundamental right deserving of protection under the Privileges and Immunities Clause. Surely, this claimed right is not vital to the preservation of the nation as a single entity, nor does this claimed right demand recognition under a "norm of comity;" hence, it is not covered by the Clause. See *Baldwin, supra,* 436 U.S. at 383; *Austin* v. *New Hampshire,* 420 U.S. at 656, 660-662 (1975). Moreover, valid regulation of the bar pursuant to disciplinary rules such as the one in question here is precisely the kind of regulation which traditionally has been carried out on a state-by-state basis and necessarily fosters differences which merely reflect the fact that this is a nation comprised of individual states. Such differences are perfectly consistent with our system of government and do not run afoul of the Privileges and Immunities Clause. See *Baldwin, supra,* 436 U.S. at 383. If admission to the bar in one state does not give an attorney the right to practice in another state, *Leis* v. *Flynt, supra,* 439 U.S. at 443, it certainly does not give an attorney the right to open a law firm under his name in a state where he is not licensed to practice. Appellant's challenge to DR 2-102(C) based upon the Privileges and Immunities Clause is consequently totally lacking in merit and must be dismissed by the Court.

C. DR 2-102(C) regulates evenhandedly to protect the citizens of New Jersey without discriminating against or unduly burdening interstate commerce.

It is, of course, firmly established that notwithstanding the affirmative grant of authority to Congress as to the regulation of interstate commerce, the states retain broad power to legislate in matters of local concern pursuant to reserved Tenth Amendment powers. See *e.g., H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 531-532 (1949). As stated in *Pike* v. *Bruce Church*, 397 U.S. 137, 142 (1970), and reaffirmed in *Hughes* v. *Oklahoma*, 441 U.S. 322, 331 (1979), "Where the challenged law regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits." Here, the challenged rule is uniformly applicable to residents and nonresidents of New Jersey for, as noted above, the distinction created by DR 2-102(C) is based solely upon admission to the New Jersey bar and not upon residence in or out-of-state.* DR 2-102(C) is simply not discriminatory on its face or in its effect.

Moreover, as has been often recognized by this Court, "the States have a compelling interest in the practice of professions within their boundaries . . . [with] broad power to establish standards for licensing practitioners and regu-

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* In this regard, the New Jersey Supreme Court sought in *In re Sackman*, *supra*, to tailor New Jersey R. 1:21-1(a) so as to allow "interstate movement while at the same time assuring a sufficient degree of competence, accessibility and accountability." 90 N.J. at 52. An attorney who has been admitted to practice in New Jersey, and who maintains a *bona fide* office in this State (whether or not he or she resides in another state), may practice law in New Jersey.

lating the practice of professions." *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 792. The states' interest in regulating lawyers is "'especially great since lawyers are essential to the primary governmental function of administering justice . . .'." *Ohralik* v. *Ohio State Bar Assn., supra,* 436 U.S. at 460, quoting *Goldfarb, supra,* 421 U.S. at 792. Indeed, "[s]ince the founding of the Republic" the states and the District of Columbia have had exclusive control over the practice of law within their boundaries. *Leis* v. *Flynt, supra,* 439 U.S. at 442. In conformity with these principles, this Court has held that a lawyer licensed in one state need not be permitted to practice in another jurisdiction. *Id.* at 443, citing *Norfolk & Western R. Co.* v. *Beatty,* 423 U.S. 1009 (1975), summarily aff'g 400 F. Supp. 234 (S.D. Ill. 1975); *Brown* v. *Supreme Court of Virginia, supra.* Certainly, lawyers not admitted in New Jersey, and therefore not permitted to practice in this State, may be limited in the use of their firm names in this State, especially in light of the inherent deception attendant upon such use.

If, as appellant contends, the Supreme Court of New Jersey has sustained DR 2-102(C) for purposes of economic protectionism, it would not have interpreted DR 2-102(C) so as to permit the use of the Jacoby & Meyers name, and other such out-of-state firm names, to be used in advertising, etc., in affiliation with New Jeresy firms. In exercising its responsibility to regulate the practice of law the court below has properly determined that in order to prevent the public from being misled, this minimal burden upon interstate commerce may be sustained. In short DR 2-102(C) is not "a protectionest measure" but rather is "a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey,* 437 U.S. 617, 625 (1978). Appellant's claim of undue burden upon interstate commerce must therefore fail.

D. Since DR 2-102(C) is rationally related to an important State interest it does not violate the Equal Protcetion Clause.

Finally, appellant claims that because New Jersey permits the use of firm names containing the names of deceased partners who were licensed to practice in this State, the prohibition on the inclusion of out-of-state partners unlicensed in New Jersey constitutes an irrational classification under the Equal Protection Clause of the United States Constitution. Preliminarily, as noted by the court below, lawyers who have not been admitted to the bar in a particular state "do not constitute a suspect class . . . deserving of extraordinary protection under the Equal Protection Clause" (Aa-B63). Further, the "right" to the use of a particular law firm name as such, rather than as an affiliate of a New Jersey firm, does not constitute an infringement upon any fundamental right protected by the Constitution. Thus, DR 2-102(C) is valid if it is "rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

The Supreme Court of New Jersey has held that a firm name such as Jacoby & Meyers is inherently misleading. Long standing custom and usage in New Jersey has limited firm names in this State to the named partners who are or were members of the New Jersey bar. Particularly in such circumstances, the use of the Jacoby & Meyers name without opportunity for explanation (see Drinker, *Legal Ethics*, *supra*, at p. 230) would confuse the public. On the other hand, it has also been the well established practice in this State for New Jersey firms to continue under the same firm name upon the death of a named partner. See DR 2-102(B). Custom in this case therefore compels a different result, since common understandings prevent deception where New Jersey firms retain the name of a deceased

partner as part of their firm names. The court below, however, acknowledges that there may be "some potential for misleading consumers" in the deceased partner rule (Aa-B64). Nonetheless, the removal of any possible potential source of deception is not required by the Constitution—a state may consider one problem at a time, establishing priorities which appear appropriate in each case. See *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955).*

Even if, as appellant contends, DR 2-102(C) is to be subjected to strict scrutiny because First Amendment concerns are implicated, the State's interest in regulating the bar and in preventing deception would withstand this level of review. See *Carey* v. *Brown*, 447 U.S. 455, 461-462 (1980); *Police Department* v. *Mosley*, 408 U.S. 92, 98-99 (1972). As amended by the Supreme Court of New Jersey, the rule is "finely tailored", *Carey* v. *Brown, supra*, 447 U.S. at 461, to permit Jacoby & Meyers to associate with New Jersey firms and to advertise that association. However, commercial speech is, under the rulings of this Court, "afforded [but] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values. . . ." *Ohralik* v. *Ohio State Bar Association, supra*, 436 U.S. at 456. See *Friedman* v. *Rogers, supra*, 440 U.S. at 10. Because commercial speech relates entirely to economic interests and not to the more basic interest in the exchange of ideas in a free and open society, the Court has refused to apply strict criteria in reviewing this form of speech. Thus, in considering the application of the overbreadth analysis in the context of ordinary commercial speech, Justice Blackmun suggested that

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* As noted earlier, the committee appointed by the Supreme Court of New Jersey is now preparing its report on DR 2-102(C) for the Court's further consideration of these issues. See *supra*, pp. 11-12.

"it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation," *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 381, and refused to apply the stricter analysis to commercial advertising. See also *Ohralik, supra,* 436 U.S. at 465 n. 25. These precedents compel the conclusion that the Equal Protection Clause also does not require strict scrutiny of state regulations where commercial speech only is at issue.

DR 2-102(C) is clearly rationally related to an important state interest; the equal protection claim raised by the appellant does not warrant review by this Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed because the constitutional questions presented are so insubstantial as to not require further review, and also because the case does not raise any issues of special importance, does not conflict with federal precedent, was correctly decided below, and may be rendered moot upon the completion of pending State proceedings.

Respectfully submitted,

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Dated: October 4, 1982

APPENDIX A

Rule 1:14 of the New Jersey Court Rules

RULE 1:14. CODES OF ETHICS

The Disciplinary Rules of the Code of Professional Responsibility and the Code of Judicial Conduct of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these rules, shall govern the conduct of the members of the bar and the judges of all courts of this State.

Where appropriate, the words "partnership," "attorney" and "lawyers" shall be construed to include professional corporations for the practice of law, as well as attorney employees, agents and shareholders thereof, and attorneys acting as "of counsel" thereto.

Note: Source—R.R. 1:25. Canons of Professional Ethics of the American Bar Association deleted July 7, 1971 and the Code of Professional Responsibility, as amended and supplemented, adopted July 7, 1971 to be effective September 13, 1971; amended November 27, 1974 to be effective April 1, 1975; amended July 16, 1981 to be effective September 14, 1981.

APPENDIX B

Rule 1:19 of the New Jersey Court Rules

RULE 1:19. ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

1:19-1. Appointment and Organization

The Supreme Court shall appoint an advisory committee on professional ethics consisting of 15 members of the bar serving for terms of 3 years with the terms of 5 members expiring each year. A vacancy occurring during a term shall be filled for the unexpired portion thereof. The court shall annually designate a member of the committee to serve as chairman. The Administrative Director or the Courts shall serve as secretary of the committee.

Note: Source—R.R. 1:26A(a).

1:19-2. Jurisdiction

The committee shall accept inquiries only from the state bar association, from any county or local bar association, or from any member of the New Jersey bar, concerning proper conduct for a member of the legal profession under the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court and other rules of this court governing the practice of attorneys. It shall not consider an inquiry involving a pending action where its opinion might affect the interests of the parties, and it may decline to accept any inquiry without stating its reasons therefor.

Note: Source—R.R. 1:26A(b) (first sentence) (c) (third sentence), (d) amended April 4, 1977, effective immediately.

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1:19-3. Form of Inquiry

All inquiries shall be addressed to the secretary who shall transmit them to the committee. They shall be in writing, shall set out the factual situation in detail, shall be accompanied by a short brief or memorandum citing the rules of court or canons of ethics involved and any other pertinent authorities, and shall contain a certificate that any opinion of the committee will not affect the interests of the parties to any pending action.

Note: Source—R.R. 1:26A(b) (second and third sentences).

1:19-4. Disposition of Inquiries

The committee may act through parts consisting of not less than 5 members, but if the opinion of any such part is not unanimous the inquiry shall be referred to the committee as a whole. No opinion shall be given by the committee as a whole unless concurred in by 9 members thereof. The opinion of the committee on any inquiry accepted for consideration shall be in writing and shall be filed with the secretary who shall transmit a copy to the person making the inquiry, and, where the committee so requests, make suitable arrangements for its publication. Published opinions shall not, insofar as practicable, identify the party or parties making the inquiry. The committee, in its discretion, may conduct a hearing on any inquiry.

Note: Source—R.R. 1:26A(c) (first, second and fourth sentences), (e).

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1:19-5. Inquiries from Supreme Court

The committee as a whole shall consider and render opinions on such matters as the Supreme Court may from time to time submit to it. Such opinions shall not be published without prior approval of the court.

Note: Source—R.R. 1:26A(f).

1:19-6. Effect of Published Opinions

Published opinions of the committee shall be binding upon the Ethics Committee in their disposition of all matters.

1:19-7. Procedure

The committee shall, subject to the approval of the Supreme Court, determine the methods and procedure to be followed in considering inquiries and expressing opinions.

Note: Source—R.R. 1:26A(g).

1:19-8. Petitions for Review

(a) Notice. Within 20 days after an opinion is published, or within 30 days after any final action of the Advisory Committee on Professional Ethics other than the publication of an opinion, any aggrieved member of the bar, bar association or ethics committee may seek review thereof by serving on the Attorney General a notice of petition for review by the Supreme Court and by filing the original notice with the Clerk of the Supreme Court.

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The notice shall set forth the petitioner's name and address and, if he is represented, the name and address of counsel. The notice shall designate the action of the Advisory Committee on Professional Ethics sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved.

(b) Deposit for Costs. Deposit for costs shall be made in accordance with R. 2:12-5.

(c) Record on Petition for Review. If the petition for review is granted, the record on review shall be the formal opinion, if any, issued pursuant to R. 1:19-4 or R. 1:19-5, the inquiry, brief or memorandum submitted, and any documents or other evidence or proof relied upon by the Advisory Committee on Professional Ethics in arriving at its determination.

(d) Form of Petition for Review. A petition for review shall be in the form of a brief, conforming to the applicable provisions of R. 2:6 and not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of tables of contents, citations and appendix. It shall contain a short statement of the matter involved, the question presented, the errors complained of and the arguments in support of the petitioner's position. It shall also contain a certification by the petitioner or counsel, if any, that the petition presents a substantial question and is filed in good faith and not for purposes of delay.

(e) Service and Filing of Petition for Review. Within 10 days after filing of the notice of petition for review, 2 copies of the petition shall be served on the Attorney General and the Secretary of the Advisory Committee on Professional Ethics and 9 copies thereof shall be filed with the Clerk of the Supreme Court.

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(f) Response to Petition for Review. The Attorney General shall within 30 days of the service of the petition serve 2 copies of his brief in opposition to the petition and file 9 copies thereof with the Clerk of the Supreme Court. The brief shall be direct and concise, shall conform to the applicable provisions of R. 2:6 and shall not exceed 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix. Within 10 days of such service, petitioner may serve 2 copies and file 9 copies of a reply brief not exceeding 9 pages if printed or 10 pages if otherwise reproduced or typed, exclusive of tables of contents, citations or appendix.

(g) Final Determination. The final determination of a petition for review may be either by written opinion or by order of the Supreme Court and shall state whether the opinion or other action of the Advisory Committee on Professional Ethics is affirmed, reversed or modified or shall provide for such other final disposition as is appropriate.

Note: Adopted April 4, 1977 to be effective immediately.